No. 11,690.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PASADENA RESEARCH LABORATORIES, INC., a corporation, and RUSSELL R. BAVOUSET,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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I.

Introduction.

Not only does the Government's brief utterly fail to answer the principal arguments of appellants' brief, but its own arguments are based on incorrect statements of the evidence and incorrect conclusions based thereon. As an illustration, on page 16 of its brief the Government states "Appellants admit that the 'Indoform' (Counts I and II) contained practically no posterior pituitary, though the label declares the presence of 3 units per cc. * * *." This is absolutely contrary to Bavouset's testimony that he made the posterior pituitary, had it assayed, and in manufacturing the Indoform put into the Indoform three units of posterior pituitary per cubic centimeter [R. 140-141].

On page 15 of its brief the Government states, "Only such highly unusual and improbable circumstances as boiling for five or six hours, * * * could have af-

fected the contents of the products." The only evidence in the case with regard to boiling for five or six hours is the testimony of the witness Mason with respect to posterior pituitary [R. 74] which is involved only in connection with Counts I and II. This statement is absolutely untrue with regard to the other products. We find many instances of such misstatements in the Government brief but obviously we cannot call all of them to the Court's attention. We. therefore, respectfully ask the Court to carefully weigh the statements and conclusions in the Government's[1] brief before accepting them as true.

II.

Samples Must Reflect the Condition of the Product as of the Time Involved in the Issues (G. Br. 18-24).

In appellants' opening brief we asserted that the Government did not prove its case beyond a reasonable doubt because not one iota of evidence was introduced to show proper handling of the goods *after*[2] they had been introduced by appellants into interstate commerce. We showed that such an absence of evidence is fatal to the Government, because there was nothing to establish that the goods when tested by the Government were in the same condition as when shipped by appellants.

We supported this argument with numerous authorities, all of which state that there must be evidence showing that the goods were properly handled and cared for (See Appellants' Br. 21, *et seq.*).

In reply to our argument the Government first quotes from 32 Corpus Juris Secundum, Sec. 607, to the effect that, "It is unnecessary to show an absence of tampering

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[1]The appellee is herein referred to as the Government and its brief is referred to as "G. Br."

[2]Italics may be considered ours throughout this brief.

on the part of every person through whose hands the article has passed; as long as the article can be identified it is immaterial in how many or in whose hands it has been." (G. Br. 19).

Corpus Juris Secundum cites but one case in support of this proposition, which is the case of *Lestico v. Kuehner,* 283 N. W. 122, 204 Minn. 125. That action was one for personal injuries in which defendant offered a punctured tire casing in evidence. Now it is quite apparent on its face that the subject matter is so different that the rules of evidence which would apply in a case like the one on appeal would not be pertinent. However, even in *Lestico v. Kuehner,* the Court said (283 N. W. 122, at page 125):

> "If changes had destroyed its identity or had made the object wholly worthless or of questionable value as evidence, an entirely different situation would have been presented."

The statement quoted by the Government from Corpus Juris Secundum must be read in conjunction with the portions quoted by appellants on page 23 of their brief, which states that in order that an article may be introduced two things are necessary: first, it must be satisfactorily identified; and, second, it must be shown to the satisfaction of the Court that no substantial change has taken place such as would render the evidence misleading. A further condition with respect to samples is that the samples "must reflect the condition of the substance or articles as of the time involved in the issues." (Appellants' Br. 23).

Reading the two paragraphs quoted by appellants, and the single paragraph quoted by the Government, it is clear that although detailed evidence may not be required as to each person who handled the goods, nevertheless there must at least be some evidence as to care and handling, in order to support a conclusion that the goods when tested

by the Government were in the same condition as they were when shipped by appellants.

Government's brief then quotes (pp. 19, 20) from *United States v. S. B. Penick & Co.*, 136 F. (2d) 413, 415, which states that "there is no hard and fast rule that the prosecution must exclude all possibility that the article may have been tampered with." This may be true but, as stated in this same opinion, *there must be some testimony with respect to "the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it"* (Appellants' Br. 21).

The excerpt quoted by the Government from the *Penick* case, shows the type of evidence which may be accepted by the Court, namely:

(1) "Here the samples were taken in the ordinary course of business for the very purpose of being retained as samples";

(2) "they were put in the usual place of business where samples were kept";

(3) "to remove them from accident or meddling and there they remained, so far as appears, undisturbed." (G. Br. 20.)

It should be noted that in the *Penick* case, the samples were taken when the purchaser *received* the shipment and were specially cared for as samples, whereas in this appeal, the goods were taken from several weeks to five months later and there is no evidence as to how they were cared for or handled.

In lieu of the evidence required by the authorities relied on, the Government asks the Court to indulge in a series of what it refers to as "inferences" that the goods were properly handled by the transportation companies, the doctors who received them, etc. Since there are no facts on which to base an inference, what the

Government asks is that the Court indulge in "speculation" and "guessing."

The Government seeks to *reverse* the presumption of innocence and the burden of proof. The Government in effect says—it must be presumed that the goods are in the same condition when tested as when shipped, and the burden of proof is on the appellants to prove that the goods were mishandled.

The Government contends it undertook "to establish the identity of the samples *as of the time of shipment,* by *circumstantial* evidence relating to their interstate shipment, the identity of the consignees and the condition of the drugs when received by the Government chemists, together with the reasonable inferences flowing from such evidence" (G. Br. 20).

Also the Government asserts "It may reasonably be assumed that the doctors who received such products handled and stored them in the normal way" (G. Br. 21).

While there may be a presumption supporting the official acts of public officers, and, in the absence of evidence to the contrary, courts presume that they have properly discharged their official duties, there is *no presumption whatever* with respect to either:

(1) That shippers and others properly handle and care for goods, so that changes cannot occur in the goods while in their custody, or

(2) That doctors, as well as nurses and others who commonly give the patients the injections on behalf of the doctor properly handle and care for goods so that changes cannot occur in the goods after they are received by the doctor.

Furthermore, in the absence of even a single line of testimony to which the products were subjected to from the time of shipment to the time when they were picked up by the inspectors, no inference whatever can be drawn

with respect to the conditions to which the products had been subjected during shipments or while in the doctors offices. There must be facts from which to draw an inference. Here there are none.

The Government has stipulated that doctors "deliberately insert other things into bottles to make a different combination of a product" [R. 168] and the unrebutted testimony shows that the contents of the bottles may become contaminated by materials carried by the hypodermic needle inserted through the rubber corks of the bottles [R. 161-165], therefore there is no basis whatsoever on which the Government can ask the Court to "assume" or "infer" that these things have not occurred to the products in suit while they were in the doctors' offices.

The Government further contends (G. Br. 20) that its evidence was strengthened by alleged admissions in Bavouset's testimony:

(1) "that the product 'Indoform' was adulterated and misbranded when it was introduced into interstate commerce," and

(2) "that all of the products here involved were likely to have been adulterated and misbranded at that time by reason of *the poor manufacturing controls maintained* by the appellants."

As to the alleged admission with regard to Indoform, here is Bavouset's testimony:

> "Q. And that is with reference to the product which became the subject matter of Counts I and II, the Indoform, and that you stated that you had had that solution *later* tested by the Cooper Laboratories who found it contained such small quantities of posterior pituitary as to be immeasurable? A. That is right; I did that.

Q. And that is, of course, *after you had shipped the product?* A. That is right." [R. 143, 144.]

Bavouset thus stated that the "product which became the subject matter of Counts I and II," namely, the contents of Ex. 3, was *later* tested by the Cooper Laboratories, *after* it had been shipped in interstate commerce. Thus it appears that Bavouset recovered some of this product after it had been shipped. How long after the evidence does not show. Nor does the evidence show how the product was handled after shipment and before it was recovered by Bavouset. There is no testimony to show that the change in the product tested by Cooper did not occur after it had been introduced into interstate commerce by appellants.

When the Government contends that the testimony referred to above is an admission of Bavouset that Indoform was not up to standard when it was introduced into interstate commerce we respectfully submit that such is a gross misinterpretation of the evidence. If the quoted testimony were construed as the Government has done, then it is contrary to Bavouset's other testimony, as to assaying the posterior pituitary and making the Indoform which will be referred to shortly. The alleged admission therefore merely goes to the credibility of the witness (See Jones on "Evidence," 4th Edition, page 557).

Jones on page 554 says, "It is a familiar rule that verbal admissions should be received with caution and subjected to careful scrutiny, no class of evidence being more subject to error or abuse." As to whether or not there was the labeled amount of posterior pituitary in Indoform we think that the best evidence is the testimony of Bavouset who testified that he made the posterior pituitary [R. 140] and knows it was up to standard because it was assayed [R. 141]. Bavouset personally

compounded the Indoform and personally measured the amount of posterior pituitary which was three International Units for each cubic centimeter of Indoform [R. 110]. No evidence could be clearer and more convincing.

As to the second alleged admission with regard to poor manufacturing controls, there is no evidence of poor manufacturing controls; but even though there were such evidence in the case this is not proof or even the basis for a presumption or inference that the goods when shipped were adulterated and misbranded.

When the Government uses the term "poor manufacturing controls" it undoubtedly refers to the fact that appellants did not always test their products at the conclusion of the manufacture. This certainly is not circumstantial evidence which would logically lead to the conclusion that the goods when shipped did not have the labeled potencies.

The corporate appellant Pasadena Research Laboratories, Inc. has been in business for six years and the appellant Bavouset has been manufacturing these preparations for twenty consecutive years [R. 108]. Bavouset has been manufacturing B-1 and B-Complex solutions for ten years and Indoform for fifteen years [R. 109]. This was the first alleged offense of either of the appellants.

Government inspectors visited the plant at Pasadena Research Laboratories very shortly after they started in business. Once a year they go through the plant very thoroughly and sometimes visit the plant as often as once a month or once every three months [R. 126]. The inspectors go through the corporation books and check their invoices of what has been shipped out [R. 127]. Thus it appears that over a long period of time the food and drug inspectors found nothing wrong with appellants' products. Apparently the inspectors found nothing

wrong with the manufacturing methods or controls used by appellants, for if they had it would have been the duty of these custodians of public health to recommend to and insist upon appellants changing their procedures.

We believe that the Government is unwarranted in drawing the conclusion with respect to appellants' manufacturing controls and that there is no inference here which can take the place of direct evidentiary proof that the goods were adulterated and misbranded when introduced into interstate commerce.

III.

Stability of Thiamine Hydrochloride in Pluri-B (Counts III and IV) and Stability of Riboflavin in Pluri-B (Count VII) (G. Br. 4, 9, 11, 15, 22, 34).

The Government's contention that "it was indisputably established that these products are extremely stable except under such unusual circumstances as boiling for five or six hours, freezing temperatures, addition of extraneous materials to contents, etc." and the many similar statements in its brief (G. Br. 22) are not in accord with the evidence.

The only testimony whatever with respect to the stability of any product whatever after being boiled for five or six hours is in connection with the stability of posterior pituitary (Count I). There is no such testimony whatever with respect to the stability of either thiamine hydrochloride (Counts III and IV) or riboflavin (Count VII) under any such conditions of temperature as "boiling for five or six hours."

The "Stability of Appellants' Products Under Heat," etc. is stated on pages 15 and 16 of Appellants' Brief and the stability of said products as affected by "Addition of Other Things Into Products" is covered on pages 16-21 of said brief.

Briefly, Dr. Icke's testimony is that thiamine hydrochloride is not stable at temperatures above 100 to 120 degrees Fahrenheit and that if the bottle, Ex. 6, "had been setting in the sunlight so that the temperature got up that high, or any other factor which might have elevated the temperature, it might have deteriorated" [R. 185].

This product, Ex. 6, was shipped from Pasadena, California, on July 16, 1945, to Reno, Nevada, was picked up by the Government inspector on August 30, 1945, and was sent to Washington, D. C. In other words, the product was shipped and handled during the heat of the summer and may well have been exposed to temperatures in excess of 100 degrees during both shipments and while in Reno.

The Government witness Capps' testimony on pages 100 and 101 of the Record is in accord with the above. He testified that thiamine hydrochloride is stable except when exposed to "extreme high temperatures," and that "heats any more than would be normal from shipping and the weather" would be excessive.

With respect to the effect of temperature on the stability of riboflavin in Pluri-B, the testimony, briefly, is that the precipitate might be due to temperature slightly above freezing [Wiley, R. 42] or to varying conditions of temperature [Bavouset, R. 145].

IV.

Reply to Government's Contention Re: Posterior Pituitary in Indoform (Counts I and II) (G. Br. 2-6, 24).

The Government argues that the posterior pituitary was below standard when the Indoform was introduced into interstate commerce and bases its argument principally on:

(1) That the tests made by Mason are reliable tests which establish that the posterior pituitary was below the labeled amount (G. Br. 4-5).

(2) That Bavouset admitted the lack of posterior pituitary (G. Br. 3).

As to the first point, we respectfully submit that Mason's own testimony clearly and convincingly establishes that he did not make a test which was capable of determining the amount of posterior pituitary present.

When asked by the Court how he could know whether posterior pituitary was present, and, if so, in what amount. Mason said "the only way that could be determined is by an assay for the presence of posterior pituitary" [R. 224]. The Court then said "It could not be determined by the test you made," and Mason answered, "that test I made is not what one might call an assay, because it is impossible to get an assay with the product under investigation" [R. 224].

We respectfully submit that this one bit of testimony alone is all that is needed to establish that Mason's test did not determine how much posterior pituitary was in the Indoform which he tested.

With respect to the alleged admission by Bavouset that the Indoform did not contain the labeled amount of posterior pituitary when shipped, we have already shown that there is no such admission in the record (see p. 6 of this brief).

The Government did not introduce any evidence tending to disprove the matters set forth on pages 16-21 of Appellants' Brief in the section entitled "Addition of Other Things Into Products," briefly

(1) that doctors insert needles into the caps of these bottles for the purpose of withdrawing the solution from them (Appellants' Brief 16),

(2) that doctors deliberately insert other things into bottles to make a different combination of a product (Appellants' Brief 18), and

(3) that you can't tell whether or not a cap has been punctured by looking at it with the naked eye (Appellants' Brief 19).

Therefore, even though we assumed for the purpose of argument (and contrary to Mason's admission that he did not assay for posterior pituitary), that Mason did determine that the posterior pituitary was below standard, still the Government cannot prevail because the Government introduced no evidence to show that any one of the above things did not happen, or to show how the goods were handled after they were introduced into interstate commerce by appellants.

V.

Reply to Government's Contentions Re: Alleged Admissions and Independent Proof of Violations Re: Thyroid Substance (Counts I and II) (G. Br. 25-28).

The label, Ex. 4, states that each cubic centimeter contains "Thyroid Substance 1 gr." and bears the notation "This preparation does not contain any known therapeutically useful constituent" [R. 63].

The Government (G. Br. 16) contends that this label is misleading (1) because other constituents admittedly do have therapeutic value, and (2) there is no clear cut

statement that this particular thyroid substance does not contain the iodine constituent.

There is no merit to the Government's contention that the label is misleading because other constituents in the product do have therapeutic value. Bavouset put the disclaimer on the product after "taking into consideration the rules and regulations." His testimony is that in this particular solution, the therapeutic value of the products in the solution, "would not be measurable" [R. 135].

The second contention, namely, there is no clear cut statement that this particular thyroid substance does not contain the iodine constituent, is an admission in itself that it contains a statement to that effect.

For the reasons stated on pages 39-45 of Appellants' Brief, we submit that there is no merit to the Government's contention. Briefly, we submit that each of the following facts clearly establishes that the Government failed to prove its case:

(1) The term "thyroid substance" has acquired a very definite and distinct meaning.

There are many preparations on the market that have labels which specify "thyroid substance" that do not contain any iodine, which preparations are used daily [R. 113]. Bavouset testified that he had some of those preparations [R. 113] and the Government did not make an issue as to said products [R. 114].

Furthermore, the product is sold only to doctors who request it [R. 111], and Bavouset has been making this product over a period of about *fifteen years* [R. 109].

(2) There is no evidence with regard to any one being misled by the term "thyroid substance,"—although Bavouset has been making the product for fifteen years. The evidence is all to the contrary.

(3) The Government witness Buell's testimony is that the solution contained in the bottle, Ex. 3, was not different from anything which the label, Ex. 4, represented it to possess. His testimony is that he did draw the conclusion that there was no active substance of thyroid in that solution [R. 94, 95].

(4) Dr. Icke's testimony that any doctor looking at the label would "certainly not" expect to find thyroxin (iodine) in the solution, and that if the doctor wanted thyroid activity he would give thyroid orally [R. 177, 178].

In support of its contention the Government cites the case of *H. N. Heusner & Son v. Federal Trade Commission,* 106 F. (2d) 596.

The facts in that case are entirely different from the facts in this case. In that case the so-called "Havana Smokers" were not made in Havana, whereas in this case, the product did contain the labeled amount of "thyroid substance."

The decision in that case reads in part as follows (pages 597, 598):

> "Second, it is possible, although the point is not reflected in the findings of the Commission, that the long misuse of the word 'Havana' has lent that term a species of secondary meaning in connection with petitioner's cigars. * * * Courts of equity now tend to take this fact into account before applying the doctrine of unclean hands in the manner above referred to. As a leading text writer has put it: 'They are now chiefly concerned with whether in the case of particularly well known marks and names, the public has become accustomed to associate a product with a definite taste, appearance, smell, etc. without in the least being deceived by a product which does not contain exactly what it professes to, but which is the identical article which had previ-

ously satisfied them.' Derenberg, Trade-Mark Protection and Unfair Trading, p. 670."

In view of the above, the Court allowed the manufacturer two years in which to eliminate the word "Havana" in designating its product, whereas in this case, although appellants and others have been selling many preparations which specify or are labeled "thyroid substance" for at least fifteen years, and such preparations are in daily use, the corporate appellant was fined the maximum of One Thousand ($1,000.00) Dollars and the individual appellant was placed on probation for five years.

VI.

Reply to Government's Contention Re: Alleged Admissions and Independent Proof of Violations Re: Thiamine Hydrochloride (Counts III and IV) (G. Br. 28-30).

On page 28 of its brief, the Government states, "With respect to the interstate shipment of 'Pluri-B' (Counts III and IV), the uncontradicted evidence is that the sample analyzed by Government witness Capps [Govt. Ex. 6] contained only 33 milligrams of thiamine hydrochloride per cc. [R. 100], though the label declares the presence of 50 milligrams of thiamine hydrochloride per cc. [R. 107]."

This statement is both false and misleading in that it implies that the evidence is uncontradicted that this product only contained 33 milligrams of thiamine hydrochloride on July 16, 1945, when the product was introduced into interstate commerce. The contrary is established on pages 4-6 of Appellants' Brief.

Briefly, the only evidence supporting the Government's contention is the unfounded opinion of the Government

witness Capps in response to an improper hypothetical question containing facts not proved. Please see Appellants' Brief, pages 26-32.

The testimony with respect to the stability of thiamine hydrochloride is set forth in a previous section entitled "III. Stability of Thiamine Hydrochloride in Pluri-B."

On page 29 of its brief, the Government contends that its affirmative evidence is strengthened by the admission that "defendants did not have the equipment necessary to make the thiochrome determination for thiamine." The Government again would reverse the presumption of innocence and shift the burden of proof to appellants, which is not in accordance with the law. See also page 8, *supra*.

Furthermore, the Government's contention is fully disproved by the positive testimony of Bavouset that he probably made the product [R. 114]; that at the time it was bottled it had the full strength that is set forth on the label [R. 115]; and that it had a five per cent override of thiamine hydrochloride [R. 116].

VII.

Reply to Government's Contention Re: Alleged Admissions and Independent Violations Re: Asserted Undissolved Materials in Ex. 1 (Count VII) (G. Br. 30-32).

The Government's statement "With respect to the other shipment of 'Pluri-B' (Count VII), the uncontradicted evidence is that all the vials in the sample examined by Government witness Wiley [Govt. Ex. 1] were badly contaminated with undissolved material visible to the naked eye [R. 34]." (G. Br. 30) and similar statements in its brief are false and misleading in that they imply that the evidence is uncontradicted that the product was contaminated when it was introduced into interstate commerce on June 18, 1946.

The only testimony whatever in support of that contention is the Government witness Wiley's answer in response to an improper hypothetical question which was duly objected to [R. 42].

We respectfully submit that Wiley's answer to the improper hypothetical question is not entitled to any weight whatever for the following reasons:

(1) Dr. Wiley did not test the precipitate in Ex. 1 chemically [R. 42] and so obviously he could not tell whether the precipitate was thiamine hydrochloride, riboflavin, one of the other materials in the product, something that had been added to the solution, or a reaction product.

(2) The hypothetical question was bad and improper in that it did not contain sufficient facts to afford grounds for a reasonable opinion or conclusion in that no mention whatever was made in it with respect to the temperature, temperature fluctuations, the addition of foreign materials, if any, or any other condition whatever to which the product had been subjected.

This contention is dealt with on pp. 26-32 of Appellants' Brief.

(3) That Wiley testified that the product Ex. 1 contained 20 times the amount of riboflavin that would stay in solution. His testimony is that it is "20 times over-saturation" [R. 46].

Wiley failed to take into consideration the presence of nicotinamide which, as Bavouset testified, is a very fine solvent for riboflavin [R. 144, 145]. Dr. Icke's testimony on p. 170 of the Record is to the same effect.

That Wiley's statement is clearly in error is also shown by the fact that according to Wiley, Pluri-B, Ex. 6, contains 10 times the amount of

riboflavin that would stay in solution. In other words, Ex. 6, according to Wiley is "10 times over-saturation"—yet it contains no precipitate whatever.

Wiley's unfounded and worthless opinion evidence is fully disproved by the positive testimony of Bavouset and Mrs. Smiley.

Bavouset testified that the precipitate was not in these bottles when they were shipped to Dr. Ryerson on June 18, 1946, that they keep control batches for a short time after the material is shipped, and that a very careful inspection is made the last thing before the product is sent out [R. 118, 119].

Mrs. Smiley, in charge of the shipping department, testified that there were no foreign particles in these bottles when she examined them for that purpose by means of an inspection lamp [R. 121, 123].

VIII.

Reply to Government's Contention "No Error Was Committed by the District Court in Permitting the Government's Witnesses to Answer Hypothetical Questions" (G. Br. 33-39).

The Government contends that "in a criminal case which is tried by the Court without a jury it is assumed that the trial court considered only competent and material evidence; consequently, the reception of incompetent evidence is not prejudicial" (G. Br. 33). Although such may be the assumption in an ordinary case, this presumption must yield to a showing to the contrary. *Fotie v. United States,* 137 F. (2d) 831, C. C. A. 8.

In the present case the appellants were seriously prejudiced by the admission of this evidence for the reason that the District Court must have relied on the answers

to these hypothetical questions. Subtract from the evidence these improper hypothetical questions and the unfounded opinion answers given in response to them and there is absolutely no evidence of guilt whatsoever; and there is no evidence whatsoever that the products were adulterated and misbranded when introduced into interstate commerce.

In *Daniel v. United States,* 127 F. (2d) 1, C. C. A. 8, the Court pointed out that since no jury was present at the trial the reception of incompetent evidence would not be prejudicial, but stated, "the only concern of this Court (the Circuit Court) is whether the judgment is supported by some competent evidence." For the reasons set forth on pages 26 to 32 of Appellants' Brief, we respectfully submit that the hypothetical questions were bad and improper and that without the incompetent answers to these questions there is no evidence whatsoever to support the judgment finding appellants guilty of the crimes charged.

Opinion Evidence Upon the Very Question in Issue.

We fail to understand how the Government can contend that "no expert witness testified in his opinion * * * that its purity and quality fell below that which it purported and was represented to possess" (G. Br. 37).

In this connection, please compare the following:

Counts I-II [R. 2-5] with the testimony of Mason [R. 75, 76]; testimony of Buell [R. 90].

Counts III-IV [R. 5-8] with the testimony of Capps [R. 100, 101].

Count VII [R. 10-12] with the testimony of Wiley [R. 40].

All of the cases cited by the Government on pages 37, 38 and 39 of its brief are either before *United States v. Spaulding,* 293 U. S. 498, or are not in point. As the

Supreme Court held in this case, the ultimate issues should not be resolved by opinion evidence (pp. 506, 507).

This rule is not limited to war risk insurance cases and has been applied in criminal cases. *People v. Crossan,* 87 Cal. App. 5, 16, 261 Pac. 531, 536.

For example, see 32 Corpus Juris Secundum, Section 446, page 74 (citing many types of cases):

> "An inference, opinion, or conclusion of a witness which is determinative of vital issues or of the ultimate fact in issue ordinarily is excluded as an invasion of the province of the jury. * * *"

See also Jones "The Law of Evidence in Civil Cases," Section 374, pages 698 and 699.

The District Judge held in accordance with the rule at one time, but later overruled the appellants' objection [R. 74, 75].

Conclusion.

The judgment of conviction appealed from should be reversed and the case remanded to the District Court with instructions to acquit the appellants.

Respectfully submitted,

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Los Angeles, California,
April 29, 1948.